No. 11801

United States
Circuit Court of Appeals
For the Ninth Circuit

UNITED STATES OF AMERICA,

Appellant,

vs.

MINA BICKFORD,

Appellee.

Upon Appeal from the District Court of the United States for the District of Montana.

BRIEF OF APPELLANT

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United States Attorney,
Billings, Montana;

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BRIEF OF APPELLANT

JURISDICTIONAL STATEMENT

The District Court had jurisdiction by virtue of the charge in the indictment invoking the application of sec. 231, Title 18 U. S. Code, defining perjury as a crime against the sovereignty of the United States, (R. 2). Pursuant to sec. 41, Title 28 U. S. Code, the District Court has original jurisdiction of prosecutions for crimes against the United States.

The Circuit Court of Appeals has acquired jurisdiction by notice of appeal and other papers pursuant to the Rules of Procedure, timely filed (R. 15). The order appealed from is one "dismissing the action" and is therefore a "decision or judgment quashing . . . an indictment" and is appealable by the provision of sec. 682, Title 28 U. S. Code, and sec. 225, Title 28 U. S. Code.

STATEMENT OF FACTS

This appeal involves a single point, viz., whether the indictment for perjury (Title 18 U. S. C. sec. 231) in this case fails to state a public offense, as the District Court ruled.

The particular point upon which the Court ruled the indictment lacking was founded upon sec. 558 of Title 18 U. S. C., in that the indictment did not comply with the following clause of sec. 558:

> "Averring such court or person to have competent authority to administer the same." (The oath taken by the defendant.)

The allegations of the indictment pertinent to the question are contained in the first twelve lines thereof, appearing on page 2 of the transcript of record, reading as follows:

> "The defendant, Mina Bickford, on or about October 22, 1945, at Butte, in the District of Montana and within the jurisdiction of this court, in the District Court of the United States for the District of Montana, then and there engaged in the trial of a criminal cause entitled 'United States of America vs. Charles Howard Downey' wherein said Downey was charged with the crime of violation of the White Slave Traffic Act, after having taken an oath as a witness before the said District Court which was administered by the Clerk of said Court that she would testify truly, * * * "

Conceding that the indictment does not allege verbatim in addition to the foregoing that said clerk "had authority to administer said oath," the government contends:

(a) That the indictment does comply with sec. 558; and

(b) That if it be held not to comply with sec. 558, it is still sufficient under Rule 7(c) of the Rules of Criminal Procedure in that sec. 558 has been amended or its effect modified by the enactment of the new criminal rules;

(c) That sec. 556 of Title 18, U. S. C. should be given effect in the solution of this question.

SPECIFICATION OF ERROR

1. The District Court erred in making its order dismissing the indictment (R. 14).

SUMMARY OF ARGUMENT

The argument consists of only two parts, (A) contending that the indictment sufficiently stated a public offense under the law existing prior to the promulgation of the Rules of Criminal Procedure, and (B) contending that the present Rules of Criminal Procedure have the effect to repeal all statutes prescribing forms of criminal pleading which may be inconsistent therewith, hence the indictment is good regardless of this Court's determination on part (A).

ARGUMENT

A. The Necessary Averment is Contained

Under existing statutes, sections 231, 558 and 556, Title 18, U. S. C. and without reference to the new Rules of Criminal Procedure, it is submitted that the indictment is sufficient. The basic requirements of a good indictment are: first, to state *facts* sufficient to inform the defendant of what offense he is charged, and second, to do this with sufficient certainty to prevent another prosecution for the same act.

Berger v. *United States,* 295 U. S. 78;

Hagner v. *United States,* 285 U. S. 427 and cases cited therein;

Hopper v. *United States,* 142 F. 2d 181 (9 Cir. 1943) and cases cited.

42 C. J. S., Indictments and Informations, sec. 90 a, page 957 and sec. 90 c, page 963, et seq.

The general rule obtains that conclusions as distinguished from facts need not be averred.

42 C. J. S., Indictments and Information, sec. 114.

The further rule obtains that matters of which the Court must or will take judicial notice need not be stated.

42 C. J. S., Indictments and Informations, sec. 113.

The following facts are contained in the pertinent portion of the indictment under discussion:

1. That the United States District Court was engaged in the trial of a criminal cause, wherein a person was charged with violation of the White Slave Traffic Act.

2. That the defendant Bickford took an oath as a witness before said court in said trial.

3. That said oath was administered by the Clerk of said Court.

From the three facts just quoted, the legal conclusion that the Clerk had authority to administer the oath which the witness took, is inescapable; further such conclusion must, as a matter of judicial knowledge, be adopted by the Court because, of course, the Court takes judicial notice that its own clerk, in the course of a trial of a cause in which the court has jurisdiction of the subject matter, does possess the requisite authority. Title 28 U. S. C. sec. 525. For the pleader to have gone further and parroted the language of sec. 558 would have added nothing to the effect of the facts thus averred.

Further illustrating our contention, if the indictment had not stated that defendant Bickford was a witness in said court, or if it had not stated that the court was in session, or had not stated that the court was engaged in a trial, or had not stated that the trial in which the court was engaged, was one of which it had jurisdiction, undoubtedly the indictment would have been lacking in the allegation of *facts* showing that the clerk possessed the authority to administer the oath. But the indictment did state all the facts which have been here enumerated. It could not have stated any more facts with reference to the basis for administering the oath and the officer who administered it, which would be in anywise pertinent.

The case of *Barnard v. United States,* 162 Fed. 618, 623-624 (9 Cir. 1908), although relied upon by the District Court in its ruling (R. 12), oddly enough appears to give greater support to the government's position than it does to the order appealed from.

The prosecution was for perjury alleged to have been committed before a United States Commissioner. The indictment did not allege that the Commissioner had authority to administer *the* oath which the defendant took, but alleged that he had authority to administer *an* oath. The Court held the indictment sufficient over the objection that it did not state the Commissioner had authority to administer *said oath,* "that is to say, the oath that was required to be taken *in that case at that time.*" In our opinion the effect of the Court's reasoning is to concede that the allegation of *"an* oath" instead of *"the* oath," if standing alone, would be insufficient. The opinion emphasizes, however, that the indictment proceeded to state certain *facts* as to the time, place and occasion of the taking of the oath, which furnished a factual basis for the taking of *judicial notice by the Court* that the Commissioner was duly authorized to administer it. In other words, the indictment in that case was like the indictment in this appeal in that it set forth the official proceeding in which the Commissioner was engaged and the participation of the accused therein and by reason of such allegations of fact, involved judicial notice and supplied the requirement of section 558. We now quote the entire paragraph from the Barnard case:

> "In our opinion the indictment is not open to the objection urged against it. It is not only alleged that the commissioner was an officer who was authorized by the laws of the United States to administer an oath and take testimony of witnesses in the matter of the application of a claimant to make final proof upon a homestead entry, *but it is alleged that the commissioner 'was then and there engaged in taking and*

hearing testimony in the matter of the application of Charles A. Watson, late of said district of Oregon, to make final proof in support of his homestead entry', and the particulars relating to the land, its location, and Watson's homestead filing upon the land and the making of final proof in this particular case are set out in the indictment, from which it appears that the proceeding had reached that stage when the claimant was entitled to make final proof, and it is alleged, 'that it then and there became and was, material that the said James S. Stewart, as such United States Commissioner for the district of Oregon and the register and receiver of the United States Land Office at The Dalles in said district of Oregon, should know and be informed from and by the said testimony whether the said Charles A. Watson had settled and resided upon and improved or cultivated the said lands so described, as required by the homestead laws of the United States', etc., and that the defendant made oath before the commissioner 'of and concerning the truth of the matter contained in said testimony so subscribed by him', and so, being sworn, 'then and there, to prevent the said James S. Stewart, United States Commissioner for the district of Oregon, and the said register and receiver of the United States Land Office at The Dalles, in said district of Oregon, from knowing the true facts and circumstances pertaining to the settlement and residences of the said Charles A. Watson upon, and his cultivation and improvement of the said lands * * * willfully, corruptly, and falsely, and contrary to his said oath did depose and swear as in said tesimony set forth, of and concerning the material facts aforesaid, and did state and subscribe material matters which he did not then believe to be true'. And it further alleged that the defendant, in and by his said testimony and upon his oath aforesaid, in a case in which the law of the United States authorized an oath to be administered, did unlawfully and willfully, and contrary to said

> oath, state material matters which he did not believe to be true. From these allegations setting forth the general authority of the commissioner to administer an oath and take testimony in this class of cases *and the statement of the proceedings before the commissioner in which he was engaged in taking and hearing testimony the court will take judicial notice that the commissioner had competent authority to administer the oath to the defendant in this particular proceeding and in this particular case.*" (Emphasis ours.)

The *Barnard* case was decided by this Circuit in 1908, long before the enactment of the Rules of Criminal Procedure. It is further submitted that the decision is stronger from the fact that the officer was administrative and not judicial, being a United States Commissioner of limited and inferior jurisdiction as contrasted with the Clerk of the District Court itself in which the indictment under discussion was filed.

Hilliard v. *United States,* 24 F. 2d 99 (5 Cir. 1928), is another case relied on by the Court in making the ruling appealed from. (R. 13.) Therein the Circuit Court of the Fifth District recited substantially in the statutory language the substance of sec. 558 Title 18, U. S. C., but in an examination of the last paragraph of the opinion appearing on page 100 of the Reporter, we find the following:

> "The allegations of the indictment *are sufficient, perhaps, to show that an oath was taken before the clerk by the defendant, as a witness in the District Court,* and that some of the testimony given by him was material; *but the indictment falls short of showing wherein the testimony alleged to have been given is false,* and it is insufficient to charge an offense. The demurrer was improperly overruled. For that error

the judgment must be reversed. It is necessary to consider the other errors assigned. Reversed." (Emphasis ours.)

It is obvious that the Court passed over the asserted failure of the indictment to allege the officer's authority to administer the oath and reversed the conviction squarely upon the insufficiency of allegations charging the testimony to have been false. Indeed, it may fairly be said that the Court concedes the sufficiency of the indictment in respect of its compliance with sec. 558 and leaves it at most an open question whether it would have reversed except for the defect which is emphasized last in the above quotation.

The only other case expressly relied on by the District Court is *Pawley* v. *United States,* 47 F. 2d. 1024—another decision by this Ninth Circuit Court of Appeals (1931). The indictment was held good as complying with sec. 558 of Title 18. The opinion is quite consistent with the contention here being made in that the officer in question, viz., a Referee in Bankruptcy, not only was alleged to have had "competent authority to administer the oath," but the indictment also set forth that:

> "There came on to be heard in the District Court before the Honorable R. W. Smith, referee in bankruptcy of the court aforesaid, at Yuma, Arizona, the first meeting of creditors at a bankruptcy proceeding; that the appellant appeared as a witness and was then and there duly sworn and took his oath as such witness, before the referee, that the testimony which he would give at the hearing, would be the truth, the whole truth and nothing but the truth; * * * "

It thus appeared that the indictment in that cause, like that in the Bickford case, stated specific facts as to what the referee in bankruptcy was doing at the time pertinent; viz., that he was presiding at a meeting of creditors in a bankruptcy proceeding. The opinion of the Court, though making no reference to the judicial knowledge of the Court of the provisions of the Bankruptcy Act in express words, did point out the provisions of sections 34 and 38 of the Bankruptcy Act, showing the power of administering oaths to witnesses and thus impliedly supported the sufficiency of the indictment under the doctrine of judicial notice. It is true that the Court stated that the conclusionary allegation that the Referee then and there had competent authority to administer the oath "of itself was sufficient," but the Court did not hold or indicate that the omission of such conclusionary allegation would have vitiated the indictment.

Hill v. *United States*, 54 F. 2d 599, 602 (10 Cir. 1931), is another case expected to be relied upon by Appellee. This decision held an indictment bad for not alleging that a Notary Public had authority to administer the oath involved. The Court says:

> "This averment seems to be a necessary one under the statute, which abbreviates the common law form of indictment for perjury and sets forth the *substance* of what it shall contain. U. S. Code Title 18, section 558." (Emphasis ours.)

The foregoing is the entire content of the opinion on the point and there is no further discussion of it. The case was reversed chiefly on points 1, 2 and 3 of syllabus, which were: (1) that there was a failure to prove the affidavit was ever presented to the Veterans Bureau; and

(2) that the alleged false statement was not a statement of material fact, (that the soldier's sister was claiming insurance). Thus, the conviction was reversed for *failure of essential proof,* under 38 U. S. C. A. sec. 552, making it perjury to make a false statement of material fact in a claim for compensation or insurance, etc.

The decision is easily distinguishable from the instant case in that in the Hill case it was necessary for the government to prove that James Talty was a Notary Public, whereas in the instant case it merely had to be established that the Clerk of the United States District Court administered the oath, which would be supplemented by the judicial notice of the Court.

The case of *Sharron* v. *United States,* 11 F. 2d 629 (2 Cir. 1926), is not on the express point of sec. 558 and its requirements, but it does illustrate the consideration of an appeal from a conviction for perjury in the light of R. S. sec. 1025, 18 U. S. C. 556, supra, P.....

The statutes discussed are in *pari materia* with sec. 558. The Court says:

> "Hardwick v. U. S., 257 F. 505, 168 C. C. A. 509 (C. C. A. 9) was like Baskin v. U. S., in alleging only that the accused knew facts inconsistent with his oath, without alleging what was the truth. In Gregorat v. U. S., 249 F. 470 (C. C. A. 5), 160 C. C. A. 428, there was no allegation of the truth and the court recognized that the indictment would have been bad at common law. It appears to be an authority for the rule we adopt. In Atkinson v. State, 133 Ark. 341, 202 S. W. 709, a statute like R. S. section 5396, was held to justify the allegation of falsity, without more. It would be tempting to say with Atkinson v. State that the clause in R. S. section 5396, was a warrant for this holding; we mean that

> portion which requires only a 'proper averment to falsify the matter wherein the perjury is assigned'. However, as this goes back to the statute of 23 Geo. II, c. 11, we can hardly take that course. Rather we prefer to rest our decision upon R. S. section 1025, especially in view of *the present disposition of all courts to ignore formal defects which have no substantial relation to the merits of the controversy.*" (Emphasis ours.)

It is hardly to be supposed that the appellee here will contend that the defendant was or could be prejudiced by the asserted defect of this indictment, which was certainly "a matter of form only." We say a matter of form advisedly because, if our reasoning is valid, there are two *forms* in which the authority of the swearing officer may be stated: The one by a verbatim statement that the officer had authority to administer the oath, and second, by stating the specific facts from which the Court takes judicial notice that he had such authority.

See 41 American Jurisprudence, "Perjury," sec. 37.

How could the defendant have been prejudiced in this case by the use of the one form rather than the other?

It amounts to this: that the defendant was informed by this indictment that on October 22, 1945, she took an oath before the United States District Court for Montana, at Butte, Montana, at a time when said Court was engaged in a certain criminal case, naming it and naming the crime for which said cause was being prosecuted, and that said oath was administered to her as a witness by the Clerk of said Court. How could the defendant have been aided in her defense by the indictment containing the further averment that the Clerk had authority to swear the witness?

It is of further moment that the government has been unable to find any decision, and apparently the District Court had none before it, any stronger than the three above discussed; viz.,

Barnard v. *United States,* 162 Fed. 618, 623-624;
Hilliard v. *United States,* 24 F. 2d. 99;
Pawley v. *United States,* 47 F. 2d. 1024;

and particularly no case has been found in which it has been held, either before or after the enactment of the new Rules of Criminal Procedure, that an indictment was bad which alleged the oath to have been administered by the Clerk of the said Court in which the indictment under attack was filed. The record sets forth the entire colloquy between Court and counsel, and it appears to be the view of the District Court that a proper interpretation of section 558 compels the pleader in an indictment to set forth in the exact language or substantial words of that section the averment, which we deem conclusionary. Impliedly it seems to us the Court ruled that the intent of Congress in enacting section 558 in the year 1790 (1 Stat. 116), during the first administration of George Washington, that words and not facts are essential. It seems to us that the Court impliedly ruled that, by reason of this particular statute, a matter of judicial notice must be pleaded, and cannot be supplied upon the basis of facts alleged. There is no indication that the Court gave consideration to the question whether prejudice would have resulted to the defendant from the omission of the words under discussion.

Of course, there was a reason for inserting in sec. 558 the requirement that the authority of the person admin-

istering the oath should be stated. Oaths may be administered by many kinds of officers—notaries public, state magistrates, administrative commissioners of the states and of the United States, from the very lowest clerical person possessing a commission to the Chief Justice of the United States. It is, of course, proper for a prosecutor, charging perjury to have been committed before an inferior magistrate or administrative functionary, to plead and to prove that a foundation in law existed for the swearing of the witness and taking of his testimony. Of course, it is necessary that this be done where a possibility exists that the officer was without authority at the time and in the proceeding, or absence of proceeding, involved. *There is no dispute as to the substantial necessity for showing official capacity and jurisdiction.* The distinction insisted upon here is that in a case like the present, where the officer administering the oath is vested by the laws of the United States with appropriate power and where it is pleaded that such power was put in action in open court in the progress of a trial within the court's jurisdiction, the manner of alleging the swearing officer's authority need not be identical with the manner of such allegation in the case of a subordinate commissioner or notary public. The judicial knowledge of the Court from facts pleaded is what makes the distinction.

For the reasons above stated it is submitted that even prior to the enactment of the new Rules of Criminal Procedure the indictment was sufficient to state a public offense.

B. Rule 7(c) As Affecting Section 558 of Title 18, United States Code.

It is the Government's position that regardless of whether or not heretofore an averment in the indictment for perjury or authority to administer the oath must be made, since the adoption of the Federal Rules of Criminal Procedure, such allegation need not be made. Rule 7(c) thereof relates to indictments in general. The part of Rule 7(c) pertinent to this appeal provides:

> The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. * * * It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. * * *

Rule 7(c) and its companion rules became effective on March 21, 1946, under Enabling Acts of Congress[1] which had authorized their promulgation by the Supreme Court of the United States. Rule 7(c) itself was promulgated under the 1940 Act (18 U. S. C. 687) and is now the law of the land[2] because of the provision of that Act that "all laws in conflict therewith shall be of no further force or effect."

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[1] Act of June 29, 1940, c. 445, 54 Stat. 688 (18 U. S. C. 687) covering proceedings prior to and including verdict or finding of guilt or innocence; Act of February 24, 1933, c. 119, 47 Stat. 904, as amended (18 U. S. C. 688), relating to appellate procedure. For further delegated authority to make procedural rules, see Act of November 21, 1941, c. 492, 55 Stat. 779 (18 U. S. C. 689), extending provisions of said Acts of 1940 and 1933, as amended, to criminal contempts, and the Act of May 9, 1942, c. 295, 56 Stat. 271 (18 U. S. C. 682) authorizing appeals by the Government from the District Courts.

[2] By successive Acts, commencing with that of September 29, 1789 (1 Stat. 93), and to the extents indicated therein, Congress has delegated its constitutional authority (Article III, Secs. 1 and 2) in respect of adjective law-making, and "the entire field of federal procedure is now within the regulatory power of the Supreme Court." (Hon. Alexander Holtzoff, Judge of the District Court of the District of Columbia, (and Secretary of the Advisory Committee that aided in the preparation of the new Rules), in an article "Reform of Federal Criminal Procedure," 3 F. R. D. 445 and 12 George Washington Law Review 119.)

Rule 7(c), as the Advisory Committee's note to this Rule states, "introduce a simple from of indictment." Rule 7(c) simply requires that an indictment "shall be a plain, concise and definite written statement of the essential facts constituting the offense charged." Only those facts necessary to establish the offense need be alleged in the indictment, and the elements of the offense of perjury are to be found in Section 231 of Title 18, U. S. C.

The new Rules, representing as they do, a *codification* of existing criminal procedural law in the Federal courts, with such changes as were deemed necessary to clarify and simplify those procedures, must control or supersede the former practice. As was said by Judge Holtzoff[3] in the article referred to in note 2, supra; 3 F. R. D. 445, 447:

> The principal significance of the new federal criminal rules is found in the attempt to reform procedure and to make far-reaching improvements as they appear necessary. Existing procedure has been simplified and *numerous out-moded technicalities that originated several centuries ago have been eliminated.* Many of these technicalities were the culmination of humanitarian efforts to ameliorate the rigors of the criminal law at a time when it was almost savage in its ferocity. * * * The simplification of procedure has been accomplished, however, without sacrifice of any safeguards that properly surround a defendant in a criminal case. * * *

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[3] See also: Vanderbilt, 29 A. B. A. Jour. 376, 377; Homer Cummings, ibid. 654, 655; Vanderbilt, The New Federal Criminal Rules, 51 Yale L. Jour. 719; Hall, Objectives of Federal Criminal Procedural Revision, ibid. 723.

As stated by the Second Circuit in *United States* v. *Achtner,* 144 Fed. 49, at 51, the courts "are no longer bound by ancient and antiquated rules of common-law criminal pleading, and can now consider the adequacy of indictments on the basis of practical, as opposed to technical, considerations." This Ninth Circuit also adheres to the modern view of the sufficiency of criminal pleadings "on the basis of practical as opposed to technical considerations." *Hopper* v. *United States,* 142 F. 2d 181, 184, supra.

See also, *United States* v. *Martinez,* 73 Fed. Supp. 403 (M. D. Penna., 1947) decided under the new Rules of Criminal Procedure, wherein the court stated that they "discarded many of the technical requirements that had existed for centuries in regard to the form in which indictments should be drawn," with particular reference to the requirements of Rule 7(c).

And in the House Report No. 2492 to accompany H. R. 4587, 76th Congress, 3rd Session, which became the Enabling Act of June 29, 1940, supra, it is said:

> The committee is of the opinion that the enactment of this legislation will promote the uniformity, simplicity, and flexibility of criminal pleadings, practice and procedure, and eliminate technicalities and delays in criminal cases.

A like statement appears in Senate Report No. 1934 on the same bill.

Section 558 of Title 18, U. S. C. was enacted in the Crimes Act of 1790 (I Stat. 112, 116), and was patterned after an English statute, 23 George II, c. 11, whose purpose was to do away with the needless prolixity and pre-

cision required by the English statute on perjury, 5 Eliz., c. 9. *United States* v. *Cuddy,* (D. C. Cal. 1889) 39 Fed. 696, 697. The American statute embodied this procedural reform in our law. Nevertheless, it, too, retained some of the common law requirements, some of the vestiges of the archaic forms of pleading indictments. Section 558 thus required matters to be pleaded which were not elements of the offense of perjury as found in Section 231; and one of these elements is the subject of this appeal—"averring such court or person to have competent authority to administer the (oath) * * *."

It is of interest to note that in both the English and American statutes the phrase "averring such court, or person, or persons to have a competent authority to administer the same" which follows the provision that it shall be sufficient in a prosecution for perjury for the indictment or information to set forth "the substance of the offense charged," and by what court, or before whom the oath was taken, is in *parenthesis,* thus apparently making the averment of authority to administer the oath merely part of the preceding, instead of a separate, jurisdictional requirement.[4]

In requiring additional elements to be pleaded in the indictment not found in the offense of perjury as defined in Section 231, Section 558, conflicts with the provision of Rule 7(c) that the indictment be a plain, concise statement of the essential facts constituting the offense. Under the provisions of the 1940 Enabling Act that all laws in conflict with the Rules shall be of no force or effect it is

[4] The parenthesis was eliminated when the original statute was incorporated into the Revised Statutes (R. S. Sec. 5396), and now appears as in Section 558.

the Government's contention that Section 558 no longer has any validity, because of its inconsistency with Rule 7(c). To hold otherwise would violate the mandate and spirit of the Enabling Act. As said by the Supreme Court in *Sibach* v. *Wilson* & *Co.,* 312 U. S. 14, 16, in passing on certain of the Rules of Civil Procedure, (promulgated under a similar Enabling Act of June 13, 1934, 28 U. S. C. 723b, c):

> * * * it is to be noted that the authorization of a comprehensive system of court rules was a departure in policy, and that the new policy envisaged in the Enabling Act of 1934, was that the whole field of court procedure be regulated in the interest of speedy, fair and exact determination of the truth.

The scope of the simplification intended under Rule 7(c) is indicated in *United States* v. *Starks,* 6 F. R. D. 43, in which Judge Holtzoff in denying a motion to dismiss an indictment for forgery for failure to set forth the forged instrument in haec verba stated:

> Assuming that at common law an indictment for forgery had to set out in haec verba the document charged to have been forged, it is the view of this Court that this requirement no longer prevails under the new Federal Rules of Criminal Procedure. Rule 7(c) provides that the indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. The rule also contains the following provision:
>
> "It"—meaning the indictment—"need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement."
>
> * * * *
>
> It is no longer necessary to comply with any technical requirements with which the common law was

> replete in respect to the contents of an indictment. It must be borne in mind that these archaic standards of the common law originated in an era when practically every felony was punishable by death and the courts devised them as a means of avoiding the necessity of imposing death sentences. These technicalities have long been outmoded. They are no longer the law in the Federal courts. The Court will deny the motion.

The Government believes to be highly important and significant as indicating that Section 558 is now superseded by Rule 7(c) the fact that Congress, which had enacted the Rules of Criminal Procedure, [5]by subsequent action indicated their understanding that such effect was intended. That understanding appears in the proposed Revision of Title 18 of the United States Code, which has twice passed the House of Representatives, first on July 16, 1946, as H. R. 2200, 79th Cong., 2d Sess., and again on May 12, 1947, as H. R. 3190, 80th Cong., 1st Sess., and omits Section 558 of Title 18. Further, in both the Report from the House Committee on Revision of Laws to accompany H. R. 2200 (H. Rept. 152, Part II, pp. A194, A225) and the Report accompanying H. R. 3190 (H. Rept. 304, pp. A214, A243), Section 558 is listed as one of the laws omitted from revised Title 18 and included

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[5] **Sibbach** v. **Wilson**, supra, in deciding that the Rules of Civil Procedure were within the powers delegated by Congress, stated:

> * * * in accordance with the Act, the rules were submitted to the Congress so that the body might examine them and veto their going into effect if contrary to the policy of the legislature.
>
> The value of the reservation of the power to examine proposed rules, laws and regulations before they become effective is well understood by Congress. It is frequently, as here, employed to make sure that the action under the delegation squares with the Congressional purpose. * * *

A similar opportunity for review by Congress was provided by the Enabling Act of 1940 in respect of Rule 7(c).

in the schedule of repeals for the reason that it is "Covered by Rule 7 of the Federal Rules of Criminal Procedure." Thus the Report of the Committee on the Judiciary on page 8, H. Rept. No. 304, 80th Cong., 1st Sess., stated:

> Much work on part II was done in anticipation of the adoption of the new Federal Rules of Criminal Procedure, effective March 21, 1946.
>
> These rules modify or supersede many criminal procedural sections. Consequently effect was given to the changes they make by revising modified sections and repealing superseded provisions.

And on page 9:

> This method of specific repeal will lift from the courts the onerous task of ferreting out implied repeals.

And the further explanation is given (H. Rept. 304, p. A233) that the word "omitted" in the tables and texts of omitted sections indicates "that the text of the Revised Statutes or Statutes at Large was not incorporated in proposed Title 18 because it was obsolete, superseded by later law, or covered by the Federal Rules of Criminal Procedure." Inclusion of Section 558 of Title 18, U. S. Code (R. S. Sec. 5396), as omitted under the above provision, is found on page A243 of this Report.

Thus it is evident that one House of Congress believed Section 558 was no longer of any force or effect because it was inconsistent with the provision of Rule 7(c) providing that an indictment need only allege the essential elements of an offense.

It would appear, therefore, that all that is now required under Rule 7(c) is that the indictment contain a "plain, concise and definite statement" of the essential facts con-

stituting the offense charged. And it is the Government's contention that the indictment here under review, does include all the essential facts required to acquaint this defendant of the perjury charge brought against her under Section 231 of Title 18, U. S. C. The *essential* elements of perjury as found in Section 231 of Title 18 U. S. C. are found within the indictment. In view of the specific allegation in the indictment that the oath was administered by the Clerk of the District Court, it would seem clearly superfluous to have included the additional allegation that the clerk had authority to administer the oath, as being "other matter not necessary to such statement." Certainly it cannot be said that such an allegation is one of the "essential facts constituting the offense charged" within the meaning of Rule 7(c).

Respectfully submitted,

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APPENDIX

Section 231, Title 18, U. S. Code:

"Section 231. (Criminal Code, section 125.) Perjury. Whoever, having taken an oath before a competent tribunal, officer, or person, in any case in which a law of the United States authorizes an oath to be administered, that he will tesitfy, declare, depose, or certify truly, or that any written testimony, declaration, deposition, or certificate by him subscribed, is true, shall willfully and contrary to such oath state or subscribe any material matter which he does not believe to be true, is guilty of perjury, and shall be fined not more than $2,000 and imprisoned not more than five years."

Section 556, Title 18, U. S. Code:

"Section 556. Same; defects of form. No indictment found and present by a grand jury in any district or other court of the United States, shall be deemed insufficient, nor shall the trial, judgment, or other proceeding thereon be affected by reason of any defect or imperfection in matter of form only, which shall not tend to the prejudice of the defendant. (R. S. section 1025.)"

Section 558, Title 18, U. S. Code:

Section 558. Same; perjury. In every presentment or indictment prosecuted against any person for perjury, it shall be sufficient to set forth the substance of the offense charged upon the defendant, and by what court, and before whom the oath was taken, averring such court or person to have competent authority to administer the same, together with the proper averment to falsify the matter wherein the perjury is assigned, without setting forth the bill, answer, information, indictment, declaration, or any part of any record of proceeding, either in law or equity, or any affidavit, deposition, or certificate, other

than as hereinbefore stated, and without setting forth the commission or authority of the court or person before whom the perjury was committed. (R. S. section 5396.)"

Section 687, Title 18, U. S. Code:

"Section 687. Proceedings in criminal cases prior to and including verdict; power of Supreme Court to prescribe rules.

The Supreme Court of the United States shall have the power to prescribe, from time to time, rules of pleading, practice, and procedure with respect to any or all proceedings prior to and including verdict, or finding of guilty or not guilty by the court if a jury has been waived, or plea of guilty, in criminal cases in district courts of the United States, including the district courts of Alaska, Hawaii, Puerto Rico, Canal Zone, and the Virgin Islands, in the Supreme Courts of Hawaii and Puerto Rico, and in proceedings before United States commissioners. Such rules shall not take effect until they shall have been reported to Congress by the Attorney General at the beginning of a regular session thereof and until after the close of such session, and thereafter all laws in conflict therewith shall be of no further force and effect."

Rules of Criminal Procedure, section 7(c):

"NATURE AND CONTENTS. The indictment or the information shall be a plain, concise and definite written statement of the essential facts constituting the offense charged. It shall be signed by the attorney for the government. It need not contain a formal commencement, a formal conclusion or any other matter not necessary to such statement. Allegations made in one count may be incorporated by reference in another count. It may be alleged in a single count that the means by which the defendant committed the offense are unknown or that he committed it by one or more specified means. The indict-

ment or information shall state for each count the official or customary citation of the statute, rule, regulation or other provision of law which the defendant is alleged therein to have violated. Error in the citation or its omission shall not be ground for dismissal of the indictment or information or for reversal of a conviction if the error or omission did not mislead the defendant to his prejudice."

Section 525, Title 28, U. S. Code:

"Section 525. Commissioners, clerks and deputy clerks may administer oaths. Except as provided in section 591 of this title United States commissioners and all clerks and all deputy clerks of United States courts are authorized to administer oaths."